

IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

C.W.P. No.836 of 2007

Alongwith

C.W.P.No.512 of 2007

Reserved on:21.8.2007

Date of decision: .8.2007

In the both the writ petitions

M/S Computer Tech. Services

Petitioners.

Versus

Bharat Sanchar Nigam Ltd. and another

Respondents.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, J.

The Hon'ble Mr. Justice V.K. Ahuja, J.

Whether approved for reporting¹?

For the petitioner: Mr.B.C.Negi, Advocate.

For the respondents: Mr.Ashok Sharma, Advocate.

Per V.K.Ahuja, J.

This Judgment shall dispose of both the above two Writ Petitions as common question of law and facts are involved therein.

CWP No.836 of 2007

This petition has been filed by the petitioner against the order passed by the respondents thereby black-listing the firm of the petitioner. The order has been challenged being violative of Article 14 of the Constitution of India.

Briefly stated, the facts of the case are that the petitioner-firm had entered into contract with respondents for

¹Whether the reporters of Local Papers may be allowed to see the Judgment?

supplying computer software and hardware of branded make. A notice was issued by the General Manager Telecom District Shimla on 05.07.2006 inviting tender for the supply of computer software and hardware of branded make. The estimated cost of the tender was Rs.22.00 lacs. The earnest money for the bid was approximately Rs.55,000/-. The last date of submission of tender was 7.8.2006 which was also the date for opening of the tender. It has further been alleged that the petitioner was successful and, therefore, an advance purchase order was issued in his favour and a formal contract was also entered into in between the parties. It was alleged that the supply was to be made by the petitioner on or before 2.1.2007. The same could not be done by the petitioner who requested for extension of time upto 15.1.2007 and the delivery period was extended upto 23.1.2007. On 24.1.2007, the respondents called upon the petitioner to supply the material within one week and the petitioner immediately supplied material worth about Rs.8.00 lacs.

On 2.2.2007, the respondents short closed the contract and forfeited the performance security of Rs.1 lac and 12 thousand. On that date, the petitioner again sought extension upto 6.2.2007 and cited the reasons for delay viz, being late delivery by the manufacturer. He asked the General Manager Telecom, District Shimla to review his decision but a show cause notice was issued by him to the petitioner on 5.2.2007 seeking an explanation as to why the petitioner-firm be not black listed as per the agreement. The petitioner replied but he was black listed vide order dated

14.2.2007 for a period of three years. Hence the writ petition filed by the petitioner challenging the said order black listing him.

In the reply filed by the respondents, they admitted the facts alleged by the petitioner but pleaded that since the petitioner failed to comply with the terms and conditions of the agreement, under the terms of the agreement the petitioner-firm was black listed after following all the legal requirements. They have supported the impugned order by stating that the petitioner failed to supply all the items as agreed on or before the date fixed or within the extended time granted to him.

We have heard the learned counsel for the parties and have gone through the record.

The submissions made by the learned counsel for the petitioner were that there is no dispute that there was a clause for black-listing of the firm which fails to supply the material within the period fixed by the respondents, but it was submitted that there were other clauses also for penalty, for forfeiture of earnest money which already stands forfeited by the respondents but this clause of black listing of the petitioner-firm for a period of three years is violative of Article 14 of the Constitution of India since there was no malafide intention or malafide act on the part of the petitioner in not making the supply within time.

On the other hand, the learned counsel for the respondents submitted that in view of the terms of the agreement, the impugned order was passed though it does cause hardship to the petitioner-firm but it is a legal order passed in view of the facts of the case after complying with all the legal formalities.

We have already mentioned above the facts of the case. As per the terms of the agreement, the supply was to be made upto 2.1.2007. The petitioner made a request on 15.1.2007 for extension of time and the delivery period was extended upto 23.1.2007. On 24.4.2007, the General Manager of the respondent had called upon the petitioner to supply the material within one week who immediately supplied material worth Rs.8.00 lac, but the whole material was not supplied and the respondents short closed the contract and forfeited the security on 2.2.2007. The petitioner again made a request for extension of time on 2.2.2007 for supplying the material upto 6.2.2007 reason being late delivery of the material by the manufacturer. However, this prayer was declined and after issuance of a show cause notice on 5.2.2007 and taking in view the reply of the petitioner, the impugned order was passed black listing the firm of the petitioner for a period of three years.

The facts of the case are not in dispute that the petitioner firm failed to supply the material by the required date and though extension was also sought which was also granted once. The petitioner failed to supply the material for which a show cause notice was issued to him on 5.2.2007. In the reply filed by him on 5.2.2007 he stated the reasons that there was acute shortage of processors with the manufacturer for which production was hampered and he also cited personal reasons for not fulfilling the contract i.e. illness of his mother and he prayed that some harsh action may not be taken. He also enclosed the letter of the manufacturer received by him. However, the impugned order was

passed black listing the firm of the petitioner for a period of three years in accordance with clause 29.2 of Section II of the bid documents.

Clause 29 of Section 2 reads thus:

“29. Barring for Future Works:

- 29..1 If the approved bidder fails to accept the Advance Purchase Order within the stipulated period mentioned in the APO his EMD will be forfeited.
- 29.2 If the approved bidder after acceptance of APO fails to supply the said equipment as per conditions of purchase order the performance security of the bidder shall be forfeited and he will be barred from participating in future tenders under GMTD Shimla for a period of Three Years from the date of opening of the said tender”.

There is no dispute that there exists such a clause for black listing the firm for a period of three years from the date of opening of the said tender. There is no dispute about the fact that earnest money of Rs.1 lac 12 thousand already stood forfeited which part of the action has not been challenged by the petitioner. This clearly shows that the petitioner has already been in a way penalized for a sum of more than Rs.1.00 lac by forfeiting his earnest money deposited by him, which penalty he has accepted. The only point worth consideration as mentioned above, is in regard to the black-listing of the firm for a period of three years. A perusal of the reply filed by the respondents shows that the impugned action was taken by the respondents because of the late supply of material and there is nothing to show that he had cheated the respondents or he had any malafide intention in not supplying the material and major part

of the material was also supplied. Therefore, the penalty of black listing the firm of the petitioner for a period of three years can be said to be harsh and keeping in view the facts and circumstances of the case, we are of the opinion that the period of black listing for a period of three years deserves to be reduced upto 31.8.2007 only and not thereafter. The impugned order passed by the respondents is modified to the extent that the period of black listing would be only upto 31.8.2007 instead of for a period of three years and thereafter, the petitioner shall be entitled to participate in the tenders etc.

The writ petition is partly allowed in the aforesaid terms.

CWP No.512 of 2007

In view of our above findings in CWP No.836 of 2007 the impugned order passed by the General Manager, Mandi of the respondents black listing the petitioner firm due to non-execution of the contractual obligations in Shimla SSA and also directing that no business can be transacted with this firm in Mandi, is modified to the extent that the impugned order shall be effective only upto 31.8.2007 only and thereafter, the petitioner shall be entitled to participate in the tenders etc.

This writ petition is also partly allowed.

The parties are left to bear their own costs.

(V.K.Ahuja), J.

(Deepak Gupta),J

August ,2007
(SDS)